Calendar No. 261

102D CONGRESS *1st Session*	SENATE	REPORT 102-177

TELEPHONE ADVERTISING CONSUMER RIGHTS ACT

Mr. HOLLINGS, from the Committee on Commerce, Science, and Transportation, submitted the following

REPORT

OF THE

SENATE COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION

TOGETHER WITH

ADDITIONAL VIEWS

ON

S. 1410

Filed under authority of the order of the Senate of OCTOBER 8 (legislative day, SEPTEMBER 19), 1991

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OCTOBER 8 (legislative day, SEPTEMBER 19), 1991.—Ordered to be printed

Mr. HOLLINGS, from the Committee on Commerce, Science, and Transportation, submitted the following

REPORT

together with

ADDITIONAL VIEWS

[To accompany S. 1410]

The Committee on Commerce, Science, and Transportation, to which was referred the bill (S. 1410) relating to the rights of consumers in connection with telephone advertising, having considered the same, reports favorably thereon with an amendment in the nature of a substitute and recommends that the bill as amended do pass.

PURPOSE OF THE BILL

The purpose of the bill is to protect the privacy interests of residential telephone subscribers by requiring the Federal Communications Commission (FCC) to prescribe regulations concerning unsolicited telephone solicitations made by "live" persons to the home. The reported bill is also intended to promote interstate commerce by restricting certain use of facsimile (fax) machines and automatic dialers.

BACKGROUND AND NEEDS

A. CONSUMER COMPLAINTS

Telemarketing is generating an increasing number of consumer complaints. The FCC received over 2,300 complaints about telemarketing calls over the past year. The Federal Trade Commission,

State regulatory agencies, local telephone companies, and congressional offices also have received substantial numbers of complaints.

In fact, the evidence indicates that more people dislike unsolicited telephone solicitations than actually file written complaints about them. A survey conducted on behalf of one of the Bell Companies, for instance, found that only one-tenth of 1 percent of the population "likes" to receive unsolicited calls.[1]

Consumers are especially frustrated because there appears to be no way to prevent these calls. The telephone companies usually do not know when their lines are being used for telemarketing purposes, and, even if they did, it is questionable whether the telephone companies should be given the responsibility of preventing such calls by monitoring conversations. Futhermore, having an unlisted number does not prevent those telemarketers that call numbers randomly or sequentially.

In general, those who complain about these calls believe that they are a nuisance and an invasion of privacy. Residential and business subscribers believe that these calls are an impediment to interstate commerce. In particular, they cite the following problems:

- telemarketers call telephone numbers reserved for emergency purposes, such as hospitals and fire and police stations;
- the calling party does not identify himself or herself;
- telemarketers disturb consumers in the privacy of their homes with unsolicited sales pitchers for undesired goods or services;
- some telemarketers use automatic dialers that will dial numbers in sequence, thereby tying up all the limes of a business and preventing any outgoing calls; and
- unsolicited calls placed to fax machines, and cellular or paging telephone numbers, often impose a cost on the called party (fax messages require the called party to pay for the paper used, cellular users must pay for each incoming call, and paging customers must pay to return the call to the person who originated the call).

B. REASONS FOR THE CONSUMER COMPLAINTS

The growth of consumer complaints about these calls has two sources: the increasing number of telemarketing firms that place telephone calls; and the advance of technology which makes telemarketing more widespread.

The telemarketing industry is growing by immense proportions and is now a multibillion dollar industry. Data shows that telemarketers realized $435 billion in sales revenue in 1990, a more than fourfold increase since 1984.

Recent changes in the telemarketing industry have made unsolicited phone calls a more cost-effective method of reaching potential customers. Over the past few years, long distance telephone rates have fallen by over 40 percent, thereby reducing the costs of engaging in long-distance telemarketing. The costs of telemarket-

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[1] Field Research Corp., The California Public's Experience with and Attitude Toward Unsolicited Telephone Calls, at 9 (March 1978) (survey conducted for Pacific Telephone Co., on file in Cal. Pub. Util. Comm'n File No. 01112); cited in Susan Burnett Luten, "Give Me a Home Where No Salesmen Phone: Telephone Solicitation and the First Amendment", *Hastings Constitutional Law Quarterly*, Vol 7:129-164. *See also*, Mark S. Nadel, "Rings of Privacy: Unsolicited Telephone Calls and the Right of Privacy," Yale Journal of Regulation, Fall 1986, pp. 99-128.

ing have fallen even more with the advent of automatic dialing machines. Many firms use these machines even when using "live" persons to deliver the message to a potential customer. These machines reduce the amount of time that each person must spend dialing numbers and waiting for the call to be answered. For instance, a telemarketer may only employ three persons for every six automatic dialers because of the high proportion of calls that are never answered.

C. THE NEED FOR LEGISLATION

Many consumers and consumer representatives believe that legislation is necessary to protect them from unsolicited telemarketing calls. One survey found that about 75 percent of persons contacted favored some form of regulation of these calls, and one-half of these favored a prohibition against all unsolicited calls.

As a result, over 40 States have enacted legislation limiting the use of automatic dialers or otherwise restricting unsolicited telemarketing. These measures have had limited effect, however, because States do not have jurisdiction over interstate calls. Many States have expressed a desire for Federal legislation to regulate interstate telemarketing calls to supplement their restrictions on intrastate calls.

The FCC, however, has decided not to take any action to regulate unsolicited calls. After examining this issue in 1980 and 1986, the FCC concluded that it did not need to take any action.[2] In its statement submitted to the Communications Subcommittee for the record of the hearing on this bill, FCC Chairman Alfred C. Sikes stated that: "It is not clear, however, that sweeping Federal legislation is required. * * * [T]his may be a situation where continued regulatory scrutiny and monitoring, subject to congressional review and oversight, is preferable to passage of legislation."[3]

D. THE LEGISLATION

In response to these concerns and the failure of the FCC to take any action, Senator Pressler introduced S. 1410, the "Telephone Advertising Consumer Rights Act," on June 27, 1991. The bill as introduced would have prohibited the use of automatic dialing machine or the making of automated voice calls to emergency lines, or cellular or paging telephone numbers. The bill also would have prohibited unsolicited advertising by fax machine.

In addition, the bill as introduced would have required the FCC to issue regulations to allow consumers to protect themselves from receiving any commercial telemarketing calls to the home. While the bill did not mandate that the FCC adopt any particular method of achieving this end, the bill as introduced contained detailed instructions as to how the FCC should develop a national "data base" (or "do-not-call" list) of consumers who desired not to receive telemarketing calls, should the FCC decide to adopt this approach. The

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[2] See, e.g., *Unsolicited Telephone Calls*, 77 FCC 2d 1023 (1980); *Automatic Dialing Devices*, FCC Release No. 86-352 (1986).

[3] Statement of Alfred C. Sikes, Chairman, FCC, before the Subcommittee on Communications, Committee on Commerce, Science, and Transportation, on S. 1410, 1462, and S. 857, July 24, 1991, pp. 1-2.

bill as introduced further permitted the FCC to allow businesses to call consumers with whom the business had an "established business relationship."

E. RESPONSE OF THE TELEMARKETERS

Telemarketers generally believe that Federal legislation is unnecessary; they believe that the tremendous growth in the telemarketing industry is evidence that may consumers want to receive these calls. The Direct Marketing Association and other groups representing companies that engage in telemarketing, however, do not oppose the restrictions concerning calls made to emergency lines, calls made to cellular or paging numbers, and unsolicited advertisements sent by fax machine.

The telemarketers had certain principal objections to S. 1410 as introduced. First, they objected to the fact that the bill was limited to commercial calls and did not include restrictions on calls made for political or charitable purposes. They believe that there is insufficient evidence to prove that consumers find commercial calls more of an invasion of privacy than other telephone solicitations.

Second, the telemarketers objected that the bill as introduced encouraged the FCC to develop a national data base consisting of those consumers who preferred not to receive telemarketing calls. The telemarketers believed that there was insufficient evidence to demonstrate that a national "do-not-call" list was the most cost-effective solution to consumer complaints.

Third, the telemarketers objection that the bill as introduced gave an exemption that would allow businesses to call those consumers with whom they has an "established business relationship." Although the telemarketers agreed that the term "established" was too vague, there was no agreement as to how this language should be changed. Some telemarketers asserted that there should be an exemption to allow a business to call those consumers who are already customers of that business. Other telemarketers wanted to limit the exemption, arguing that any exemption could be anticompetitive in that it would prevent a business from calling a customer of its competitor.

F. CHANGES TO THE BILL AS INTRODUCED

As a result of these concerns and others expressed to the Committee, Senator Pressler offered an amendment in the nature of a substitute to S. 1410 when this bill was consider by the Committee at the executive session on July 30, 1991. The amended bill, as ordered reported by the committee, contained the following changes to the bill as introduced.

1. The language concerning the FCC proceeding on commercial telemarketing calls to the home was altered so that it would apply only to calls placed by "live" humans (not by machines).

2. The detailed language specifying how the FCC should implement a national data base was dropped from the statutory language. It was agreed, however, that this language would be included in the report, with an acknowledgment specifically that the FCC should consider alternatives to the national data base in determin-

ing how to carry out the purposes of this bill. (The stricken statutory language has been replicated later in this report.)

3. The language authorizing the FCC to exempt those businesses that had an "established business relationship" was not included in the substitute. Instead, the reported bill changes the wording of the type of telephone calls that the FCC is directed to address from "telephone solicitations" to "unsolicited telephone solicitation." This language is intended to reflect the view that, if a consumer indicates his or her consent to receive telemarketing calls or solicits or invites such calls, telemarketers would not be restricted in placing such calls to that consumer.

The Committee does not intend the term "unsolicited telephone solicitation" to include survey research. A call encouraging a purchase, rental or investment would fall within the definition, however, even though the caller purports to be conducting a survey. The Committee believes that the term "unsolicited telephone solicitation" should be defined in greater detail by the FCC in carrying out its rulemaking. In so doing, the FCC should examine consumers' desires as to which calls made by which businesses, and concerning which products or services, the consumer would not ordinarily object to receiving. The FCC may find that consumers generally do not object to receiving calls from an entity concerning a specific product or service that they have already purchased from that entity. For instance, if a consumer purchases a product from a particular company, the FCC may find that that consumer generally would not object to a followup call concerning additions or updates for that product offered by that company or its affiliate. Such may not be the case, however, with respect to calls made by that same company concerning different products or services unrelated to the initial transaction, or to calls concerning the initial transaction made by another company. At the same time, the FCC also should keep in mind the need to establish terms for fair competition—the FCC should recognize that it may be anticompetitive to allow certain companies to call consumers to offer a product or service related to the initial transaction and not to allow competitors to make such calls.

The FCC also should consider the case of group contracts with affinity groups. For instance, if the governing board of an organization signs an agreement with a life insurance company to offer discounted life insurance policies to the members of the organizations, the members of the organization, the member of that organization may be considered to have given their "implied" consent to be called by this life insurance company. Such consent need not necessarily be implied simply because of the consumer's membership in an organization. Whether such implied consent exists or not may depend upon whether the representative of the group who signs the agreement is accountable (in the form of direct elections or otherwise) to its members.

4. The reported bill includes language specifically addressing local solicitations. As part of its rulemaking, the FCC should consider whether local telephone solicitations including those made by small businesses and holders of second-class mail permits, should be able to operate with less burdensome methods and procedures than other telephone solicitations. The FCC should consider the

costs of alternative methods and procedures to local telephone solicitation and to small businesses. Much telephone solicitation is done nationally or regionally, making it difficult for State or local bodies to oversee. Some telephone solicitation is, however, done by businesses that serve a single locality. Such local telemarketing, within a metropolitan area or even smaller community, may be subject to local "better business" community standards. Some local businesses such as local grocery stores, local newspapers, and local health maintenance organizations are rooted in the community and responsive to community standards. The FCC should consider the extent and effectiveness of these local regulations in its decisions.

5. The reported bill removes the prohibition on using fax machine to call emergency lines and cellular or paging numbers, because fax messages are sometimes sent for emergency purposes.

6. The reported bill clarifies the applicability of the bill to nonprofit entities. The original bill stated that calls made by a tax-exempt, nonprofit organization were not covered by the bill. The reported bill states that calls made by or on behalf of a tax-exempt, nonprofit organization are not covered by the bill. This exemption means that calls made by a for-profit entity that is hired by a nonprofit entity to place calls on behalf of the nonprofit entity are not covered by this bill.

G. CONSTITUTIONAL CONCERNS

Some individuals have raised questions about whether S. 1410 is consistent with the First Amendment protections of freedom of speech. The Committee believes that the bill is fully consistent with those protections.

With respect to the reported bill's limitations on the use of autodialers and fax machines, the Committee believes that S. 1410 is an example of a reasonable time, place, and manner restriction on speech, which is constitutional. In requiring users of these machines to identify the person initiating the call and requiring that these machines disconnect the line within a certain period of time, the reported bill imposes reasonable restrictions on the manner of speech. The Supreme Court has recognized the legitimacy of reasonable time, place, and manner restrictions on speech when the restrictions are not based on the content of the message being conveyed. See, *Kovacs* v. *Cooper,* 336 U.S. 77 (1948).

With respect to the provisions to protect residential customers' privacy rights, the Committee believes that the reported bill provides the FCC with sufficient direction and flexibility to design regulations that will be fully consistent with the Constitution. The legislation directs the FCC to balance individual privacy rights, public safety interests, and commercial freedoms of speech and trade. The Committee expects that the FCC will issue regulations that protect subscribers' privacy rights without intruding unnecessarily and inappropriately on the First Amendment rights of the speaker.

The Supreme Court has recognized that certain restrictions on speech can be justified in the interest of privacy. For instance, the Court found that "in the privacy of the home * * * the individual's right to be left alone plainly outweighs the First Amendment

rights of an intruder." *FCC* v. *Pacifica Found.*, 438 U.S. 726, 748 (1978). Moreover, commercial speech is susceptible to more stringent governmental limits and regulation because "the Constitution accords a lesser protection to commercial speech than other constitutionally guaranteed expression." *Central Hudson Gas* v. *Public Service Commission,* 447 U.S. 557, 563 (1980); *citing* 436 U.S. 447 at 456–7.

Central Hudson set forth a three-prong test for determining the constitutionality of limitations on commercial speech. If commercial speech concerns lawful activity and is not misleading, governmental regulation of such speech can be permitted if (1) there is a substantial governmental interest served by the restriction; (2) if the restriction directly advances that governmental interest; and (3) if the restriction is no more extensive than necessary to serve that governmental interest.

In ordering S. 1410 reported, the Committee finds that there is a substantial governmental interest in protecting telephone subscribers' privacy rights from unsolicited telephone solicitations. As noted previously, consumers are complaining in increasing numbers about the problem of unsolicited telephone solicitations. Protecting the privacy rights of individuals in their homes is one of the fundamental purposes of government. These complaints have grown in number despite the attempts by several State legislatures to protect consumers from intrastate calls. Federal legislation is thus necessary to protect consumers from the growing invasion of their privacy rights.

While the reported bill does not set forth specifically what restrictions the FCC shall adopt to enforce the provisions of the bill, the legislation provides the FCC with sufficient guidelines and options so that it may adopt regulations that meet the other two prongs of the *Central Hudson* test. The Committee expects that the regulations adopted by the FCC will protect consumers' privacy interests in their homes consistent with the Constitution.

H. USE OF DATA BASE PERMITTED

The regulations mandated by the reported bill may require the establishment and operation of a single national data base to compile a list of telephone numbers of residential subscribers who object to receiving telephone solicitations, or to receiving certain classes or categories of telephone solicitations, and to make that compiled list available for purchase. If the FCC decides to require such a data base, such regulations shall—

(A) specify a method by which the FCC will select an entity to administer such data base;

(B) require each common carrier providing telephone exchange service, in accordance with regulations prescribed by the FCC, to inform subscribers for telephone exchange service of the opportunity to provide notification, in accordance with regulations established by the FCC, that such subscriber objects to receiving telephone solicitations;

(C) specify the methods by which each telephone subscriber shall be informed, by the common carrier that provides local exchange service to that subscriber, of (i) the subscriber's right

to give or revoke a notification of an objection and (ii) the methods by which such right may be exercised by the subscriber;

(D) specify the methods by which such objections shall be collected and added to the data base;

(E) prohibit any residential subscriber from being charged for giving or revoking such notification or for being included in such a data base;

(F) prohibit any person from making or transmitting a telephone solicitation to the telephone number of any subscriber included in such data base;

(G) specify (i) the methods by which any person desiring to make or transmit telephone solicitations will obtain access to the data base, by area code or local exchange prefix, as required to avoid calling the telephone numbers of subscribers included in such data base; and (ii) the costs to be recovered from such persons;

(H) specify the methods for recovering, from persons accessing such data base, the costs involved in notifying, collecting, updating, disseminating, and selling, and other activities related to, the operations of the data base that are incurred by the entities carrying out those activities;

(I) specify the frequency with which such data base will be updated and specify the method by which such updating will take effect for purposes of compliance with the reported bill;

(J) be designed to enable and require States to use the data base mechanism selected by the FCC for purposes of administering or enforcing State law;

(K) prohibit the use of such data base for any purpose other than compliance with the requirements of the legislation and any such State law and specify methods for protection of the privacy rights of persons whose numbers are included in such data base; and

(L) require each common carrier providing services to any person for the purpose of making telephone solicitations to notify such person of the requirements of the reported bill and the regulations promulgated thereunder.

If the FCC decides to require the data base mechanism described above, the FCC shall—

(A) in developing procedures for gaining access to the data base, consider the different needs of telemarketing conducting business on a national, regional, State, or local level;

(B) develop a fee schedule or price structure for recouping the cost of such data base that recognizes such differences and—

(i) reflects the relative costs of providing a national, regional, State, or local list of phone numbers of subscribers who object to receiving telephone solicitations;

(ii) reflects the relative costs of providing such lists on paper or electronic media; and

(iii) does not place an unreasonable financial burden on small business; and

(C) consider (i) whether the needs of telemarketers operating on a local basis could be met through special markings of area

white pages directories, and (ii) if such directories are needed as an adjunct to data base lists prepared by area code and local exchange prefix.

I. CONCLUSION

The Committee believes that Federal legislation is necessary to protect the public from unsolicited telephone solicitations. These calls can be an invasion of privacy, an impediment to interstate commerce, and a disruption to essential public safety services. Federal action is necessary because States do not have the jurisdiction to protect their citizens against those who use machines and those who make solicitations through interstate telephone calls. The Federal Government has a legitimate interest in protecting the public from these unsolicited calls, and the reported bill directs the FCC to issue regulations that are the minimum necessary to protect the public against the harm caused by these calls. The bill is consistent with the Constitutional guarantee of free speech.

Legislative History

Senator Pressler introduced S. 1410 on June 27, 1991, with Senators Conrad, Roth, and Smith as cosponsors. The Communications Subcommittee held a hearing on S. 1410 and S. 1462, the Automated Telephone Consumer Protection Act, on July 24, 1991. Witnesses included representatives of consumer organizations, the Direct Marketing Association, and the mobile telephone services industry. On July 30, 1991, in open executive session, the Committee ordered S. 1410 reported, with an amendment in the nature of a substitute, without objection.

The House of Representatives also has been considering telemarketing legislation. The House Telecommunications and Finance Subcommittee favorably reported H.R. 1304, the Telephone Advertising Consumer Rights Act, on May 9, 1991, and the House Energy and Commerce Committee favorably reported a modified version of H.R. 1304 on July 30, 1991. (S. 1410 is a companion bill to H.R. 1304.) The House bill directs the FCC to conduct a rulemaking to address consumer concerns about telephone solicitations. It also imposes restrictions on calls to emergency lines and unsolicited advertising by fax machine that are similar to the restrictions contained in S. 1410, as reported. Congresswoman Unsoeld (D–WA) has introduced legislation in the House (H.R. 1589) to ban the use of autodialers. No action on this bill has yet been taken.

In the 101st Congress, the House passed a bill (H.R. 2921) similar to the bill (H.R. 1304) it is currently considering, but that bill was not passed by the Senate before Congress adjourned.

Summary of Major Provisions

1. *Emergency and Cellular lines*: The reported bill would ban autodialed calls, and artificial or prerecorded calls, from being made to emergency lines and paging and cellular phones.

2. *Junk Fax*: The reported bill would ban all unsolicited advertisements sent by fax machine, unless the receiver invites or gives permission to receive such advertisements.

3. *Technical and Procedural Requirements*:

a. *Autodialers*: Autodialers must identify the initiator of the call, must give the telephone number of the business placing the call, and must disconnect the line within 5 seconds of receiving notice that the called party has hung up the telephone.

b. *Fax machines*: Fax machines must identify the sender on each page or the first page of each transmission, and must give the telephone number of the sending machine or business.

4. *Live Telephone Solicitations*: The reported bill directs the FCC to adopt rules to protect consumers' rights to not receive in their homes unsolicited telephone solicitations placed by "live" persons. In this regard, the FCC shall consider use of an electronic data base, telephone network technologies, industry and company-based "do-not-call" lists, and other methods.

Estimated Costs

In accordance with paragraph 11(a) of rule XXVI of the Standing Rules of the Senate and section 403 of the Congressional Budget Act of 1974, the Committee provides the following cost estimate, prepared by the Congressional Budget Office:

U.S. Congress,
Congressional Budget Office,
Washington, DC, September 9, 1991.

Hon. Ernest F. Hollings,
Chairman, Committee on Commerce, Science, and Transportation, U.S. Senate, Washington, DC.

Dear Mr. Chairman: The Congressional Budget Office has reviewed S. 1410, the Telephone Advertising Consumer Rights Act, as ordered reported by the Committee on Commerce, Science, and Transportation on July 31, 1991. CBO estimates that implementation of S. 1410 would cost between $4 million and $6 million over the next five years, assuming appropriation of the necessary amounts. Enactment of S. 1410 would not affect direct spending or receipts. Therefore, pay-as-you-go procedures would not apply to the bill.

S. 1410 would ban unsolicited telemarketing calls to emergency services, paging and cellular telephones. The bill would also ban unsolicited facsimile advertisements. S. 1410 would direct the Federal Communications Commission (FCC) to revise standards for telephone facsimile machines and artificial and prerecorded voice systems. Finally, the bill would direct the FCC to conduct a rulemaking proceeding examining the need to protect the privacy rights of residential telephone subscribers and to prescribe regulations protecting such privacy rights.

Based on information from the FCC, CBO estimates that promulgating and enforcing the various rules would cost about $700,000 over the next five years. If the FCC determines that a database containing a list of residential subscribers who object to receiving telephone solicitations is required to protect the privacy rights of residential telephone subscribers, creation, maintenance, and use of such a database could cost between $3 million and $5 million over the next five years, depending on the size and capabilities of the

system. We believe that such a database would probably be required.

CBO estimates that enactment of this bill would result in no cost to State or local governments.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is John Webb, who can be reached at 226–2860.

Sincerely,

ROBERT D. REISCHAUER,
Director.

REGULATORY IMPACT STATEMENT

In accordance with paragraph 11(b) of rule XXVI of the Standing Rules of the Senate, the Committee provides the following evaluation of the regulatory impact of the legislation, as reported.

NUMBER OF PERSONS COVERED

This bill, as reported, will impose a limited regulatory burden on some equipment manufacturers and may have an impact on some telemarketers, depending upon the FCC's ultimate decisions. The reported bill directs the FCC to issue regulations to protect the privacy of residential telephone subscribers from unsolicited telephone solicitations. Telemarketers will be required to comply with whatever measures the FCC orders. Some action will impose less of a regulatory burden than others. For instance, the FCC may decide to take advantage of new technology within the telephone network that will allow customers to block calls from telemarketers. In this case, the telemarketers will not be required to change its practices in any way. The Committee expects that the FCC will take into account the regulatory burdens in deciding what course of action to pursue.

Telemarketers will also be required to ensure that they do not place automated calls to emergency lines or to cellular or paging numbers. These restrictions are necessary to accomplish the objectives of the legislation. The bill, as reported, does not bar telemarketers, however from placing unsolicited telephone solicitations to business users.

Also, the reported bill prohibits telemarketers from sending unsolicited advertisements via a fax machine. Under the definition of "unsolicited advertisement" contained in the bill, the recipient either must invite or must give permission to receive an advertisement via a fax machine. In other words, as long as the recipient of a fax message either invites or grants permission, telemarketers may continue to send such fax messages. While telemarketers might be responsible for determining whether a potential recipient of an advertisement, in fact, has invited or given permission to receive such fax messages, such responsibility is the minimum necessary to protect unwilling recipient from receiving fax messages that are detrimental to the owner's uses of his or her fax machine. Such restrictions do not apply to fax messages that are not "advertisements."

Finally, the reported bill impose some minimal technical requirements on all fax machines that require them to include the name,

address, and telephone number of the person sending any fax message. In addition automated telephone equipment manufacturers must ensure that their equipment disconnects the called party's line within 5 seconds of the time the equipment is notified that the called party has hung up the telephone. These requirements may impose a minimal burden on the manufacturers of such machines, although most machines already comply with these requirements. The Committee has received no objections to these requirements.

These minimal burdens must be compared to the great number of people who will benefit from the protection of these regulations. As noted previously, it is estimated that these machines are used to call as many as 7 million Americans every day, and it is estimated that some 30,000 telemarketing agents make calls to 18 million Americans every day.

ECONOMIC IMPACT

The reported bill may have a minimal economic impact on the telemarketing industry. The bill may limit the number of persons that telemarketers will be able to contact by phone for the purpose of engaging in commercial solicitation. This limitation is unlikely to have a significant impact on the potential sales by telemarketers because the people who refuse to be contacted by a telemarketer are unlikely to accept the telemarketer's commercial offer. Further, this legislation continues to permit telemarketers to place calls to business numbers and to those who solicit or otherwise welcome such calls. This bill does not prevent telemarketers from engaging in any other form of advertising.

PRIVACY

The reported bill will result in a significant benefit in protecting the personal privacy of residential telephone subscribers. The evidence gathered by the Committee indicates that a substantial proportion of the public believes that these calls are a nuisance and an invasion of one's privacy rights in the home. The Supreme Court has recognized explicitly that the right to privacy is founded in the Constitution, and telemarketers who place telephone calls to the home can be considered "intruders" upon that privacy. The reported bill explicitly directs the FCC to adopt regulations to protect the privacy interests of those people who do not wish to receive telephone solicitations.

PAPERWORK

The reported bill adds a new section to the Communications Act of 1934, and it requires the FCC to revise its technical and procedural standards for fax machines and automated telephone equipment. These technical and procedural standards already exist in the industry; the FCC need only accept these standards, which already have been developed by the industry. The FCC also may initiate a rulemaking proceeding to develop regulations to enforce the provisions of this bill. Such rulemaking proceedings are unlikely to require a great deal of paperwork because of the relatively straightforward nature of the restrictions contained in this bill. The reported bill imposes no additional reporting requirements on

any of the parties affected by the legislation. The paperwork burden on the FCC and on any parties affected by this bill thus will be minimal.

SECTION-BY-SECTION ANALYSIS

SECTION 1.—SHORT TITLE

This section states that the bill's short title is the "Telephone Advertising Consumer Rights Act."

SECTION 2.—FINDINGS

This section sets forth congressional findings as follows:

(1) the use of the telephone to market goods and services to the home and to businesses is now pervasive due to improved telemarketing techniques;

(2) the telemarketing industry consists of over 30,000 businesses using 300,000 solicitors to call over 18,000,000 Americans each day and generating $435 billion in 1990 in annual sales;

(3) certain telemarketing practices are an invasion of privacy and can pose a safety risk when they seize emergency telephone lines;

(4) consumers are outraged over the increase in telemarketing calls;

(5) over half the States have laws restricting intrastate telemarketing but Federal legislation is needed to protect against interstate telemarketing;

(6) the Constitution does not prohibit restrictions on commercial telemarketing; and

(7) privacy, safety, and commercial freedom of speech interests must be balanced to protect individual privacy rights while permitting legitimate telemarketing.

SECTION 3.—RESTRICTIONS ON THE USE OF TELEPHONE EQUIPMENT FOR ADVERTISING

Subsection (a) adds a new section 228 to the Communications Act of 1934.

New section 228(a) sets forth definitions of an "automatic telephone dialing system", a "telephone facsimile machine", an "unsolicited telephone solicitation", and "unsolicited advertisement".

New section 228(b)(1) prohibits the making of any unsolicited telephone solicitation in violation of the regulations prescribed by the FCC pursuant to subsection (c) of new section 228. New section 228(b)(2) prohibits sending unsolicited advertisements by a fax machine. New section 228(b)(3) prohibits the use of any automated telephone dialing system, or artificial or prerecorded voice, to place calls to emergency telephone lines of a hospital, medical physician or service office, health care facility, or fire protection or law enforcement agency. This subsection also prohibits the use of autodialers or artificial or prerecorded voices to paging or cellular telephone lines. This prohibition does not apply to calls made for emergency purposes.

New section 228(c)(1) requires the FCC to initiate a rulemaking proceeding within 120 days after the date of enactment of this section concerning the need to protect residential telephone subscribers' privacy rights to avoid receiving unsolicited telephone solicitations to which they object. The proceeding shall—

(A) further define "unsolicited telephone solicitation" consistent with the definition contained in subsection (a)(3) of new section 228;

(B) compare the costs and benefits of several different methods and procedures, such as the use of telephone electronic data bases, telephone network technologies, special directory markings, industry and company-based "do-not-call" systems, and any other alternatives, individually or in combination, for protecting such privacy rights;

(C) evaluate the category of entities that could establish and administer the methods and procedures identified in subparagraph (B) of this paragraph;

(D) consider whether the same procedures that apply to interstate telephone solicitations should also apply to local telephone solicitations, such as those made by small businesses and newspapers and other holders of second-class mail permits; and

(E) develop proposed regulations to implement the methods and procedures that the FCC determines are most effective and efficient to protect subscribers' privacy rights.

New section 228(c)(2) requires the FCC to conclude the rulemaking within 240 days of the date of enactment of this section and prescribe regulations to implement methods and procedures for protecting the privacy rights of residential subscribers in an efficient, effective, and economic manner and without the imposition of any additional charge to telephone subscribers.

New section 228(d)(1)(A) prohibits the sending of a communication by a fax machine or automatic telephone dialing system that does not comply with technical standards prescribed under this subsection. New section 228(d)(1)(B) requires that any message sent by a computer or other electronic device via fax machine identify the date, time, and company's name, and the phone number of the company or sending machine, in the margin of every page or the first page of each transmission.

New section 228(d)(2) requires the FCC to set technical and procedural standards so that all fax machines manufactured later than 6 months after the date of enactment of this section and capable of being used for unsolicited advertising have the capability of making such identification of the sender of the message. The FCC shall exempt from such standards, for 18 months after enactment, those fax machines that cannot engage in automatic dialing and transmission and that cannot operate with a computer.

New section 228(d)(3) requires the FCC to set technical and procedural standards for systems sending artificial or prerecorded voice messages via telephone.

Subparagraph (A) of new section 228(d)(3) requires all artificial or prerecorded telephone messages to identify the business initiating the call and state the telephone number or address of such business. Subparagraph (B) requires any artificial or prerecorded voice

system to release the called party's line within 5 seconds of receiving notification that the called party has hung up.

New section 228(e) states that nothing in this legislation preempts more restrictive State action over intrastate calls regarding the use of fax machines, automatic telephone dialing systems, and artificial or prerecorded voice messages.

New section 228(f) preempts any inconsistent State regulation concerning interstate calls.

Subsection (b) of this section of the reported bill is a conforming amendment.

CHANGES IN EXISTING LAW

In compliance with paragraph 12 of rule XXVI of the Standing Rules of the Senate, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new material is printed in italic, existing law in which no change is proposed is shown in roman):

COMMUNICATIONS ACT OF 1934

Section 2 of that Act

APPLICATION OF ACT

SEC. 2.(a) * * *

(b) Except as provided in section 223 or section 224 [and 225], *225, and 228*, and subject to the provisions of section 301 and Title VI, nothing in this Act shall be construed to apply or to give the Commission jurisdiction with respect to (1) charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service by wire or radio of any carrier, or (2) any carrier engaged in interstate or foreign communication solely through physical connection with the facilities of another carrier not directly or indirectly controlling or controlled by, or under direct or indirect common control with such carrier, or (3) any carrier engaged in interstate or foreign communication solely through connection by radio or by wire and radio, with facilities, located in an adjoining State or in Canada or Mexico (where they adjoin the State in which the carrier is doing business), of another carrier not directly or indirectly controlling or controlled by, or under direct or indirect common control with such carrier, or (4) any carrier to which clause (2) or clause (3) would be applicable except for furnishing interstate mobile radio communication service or radio communication service to mobile stations on land vehicles in Canada or Mexico; except that sections 201 through 205 of this Act, both inclusive, shall, except as otherwise provided therein, apply to carriers described in clauses (2), (3), and (4).

Title II of that Act

TITLE II—COMMON CARRIERS

SECS. 201 through 227. * * *

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RESTRICTIONS ON THE USE OF TELEPHONE EQUIPMENT FOR ADVERTISING.

SEC. 228. (a) DEFINITIONS.—As used in this section:

(1) The term "automatic telephone dialing system" means equipment which has the capacity—

(A) to store or produce telephone numbers to be called, using a random or sequential number generator; and

(B) to dial such numbers.

(2) The term "telephone facsimile machine" means equipment which has the capacity to transcribe text or images, or both, from paper into an electronic signal and to transmit that signal over a regular telephone line.

(3) The term "unsolicited telephone solicitation" means a telephone call by a live person for the purpose of encouraging the purchase or rental of, or investment in, property, goods, or services, or for other commercial purposes, which is transmitted to any person without that person's prior express invitation or permission. Such term does not include calls or messages made by or on behalf of a tax exempt nonprofit organization.

(4) The term "unsolicited advertisement" means any material advertising the commercial availability or quality of any property, goods, or services which is transmitted to any person without that person's prior express invitation or permission.

(b) RESTRICTIONS.—It shall be unlawful for any person within the United States by means of telephone—

(1) to make any unsolicited telephone solicitation in violation of the regulations prescribed by the Commission pursuant to subsection (c);

(2) to send an unsolicited advertisement by a facsimile machine; and

(3) to make any call using any automatic telephone dialing system, or an artificial or prerecorded voice—

(A) to any emergency telephone line or pager of any hospital, medical physician or service office, health care facility, or fire protection or law enforcement agency; or

(B) to any telephone number assigned to paging or cellular telephone service.

(c) PROTECTION OF SUBSCRIBER PRIVACY RIGHTS.—

(1) RULEMAKING PROCEEDING REQUIRED.—Within 120 days after the date of enactment of this section, the Commission shall initiate a rulemaking proceeding concerning the need to protect residential telephone subscribers' privacy rights to avoid receiving unsolicited telephone solicitations to which they object. The proceeding shall—

(A) further define "unsolicited telephone solicitation" consistent with subsection (a)(3);

(B) compare and evaluate alternative methods and procedures, including the use of telephone electronic databases, telephone network technologies, special directory markings, industry and company based "do not call" systems, and any other alternatives, individually or in combination, for protecting such privacy rights, in terms of their cost effectiveness and their other advantages and disadvantages;

(C) evaluate the categories of public and private entities that would have the capacity to establish and administer such methods and procedures;

(D) consider whether such methods and procedures may apply for local telephone solicitations, such as those of small businesses or holders of second class mail permits; and

(E) develop proposed regulations to implement the methods and procedures that the Commission determines are most effective and efficient to accomplish the purposes of this section.

(2) REGULATIONS.—Not later than 240 days after the date of enactment of this section, the Commission shall conclude the rulemaking proceeding initiated under paragraph (1) and shall prescribe regulations to implement methods and procedures for protecting the privacy rights described in such paragraph in an efficient, effective, and economic manner and without the imposition of any additional charge to telephone subscribers.

(d) TECHNICAL AND PROCEDURAL STANDARDS.—

(1) PROHIBITION.—It shall be unlawful for any person within the United States—

(A) to initiate any communication using a telephone facsimile machine, or to make any telephone call using any automatic telephone dialing system that does not comply with the technical and procedural standards prescribed under this subsection, or to use any telephone facsimile machine or automatic telephone dialing system (to make any telephone solicitation) in a manner that does not comply with such standards; or

(B) to use a computer or other electronic device to send any message via a telephone facsimile machine unless such person clearly marks, in a margin at the top or bottom of each transmitted page of the message or on the first page of each transmission, the date and time it is sent and an identification of the business sending the message and the telephone number of the sending machine or of such business.

(2) TELEPHONE FACSIMILE MACHINES.—The Commission shall revise the regulations setting technical and procedural standards for telephone facsimile machines to require that any such machine which—

(A) is manufactured after 6 months after the date of enactment of this section; and

(B) can be used for the distribution of unsolicited advertising.

clearly marks, in a margin at the top or bottom of each transmitted page or on the first page of each transmission, the date and time sent, an identification of the business sending the message, and the telephone number of the sending machine or of such business. The Commission shall exempt from such standards, for 18 months after such date of enactment, telephone facsimile machines that do not have the capacity for automatic dialing and transmission and that are not capable of operation through an interface with a computer.

(3) ARTIFICIAL OR PRERECORDED VOICE SYSTEMS.—The Commission shall prescribe technical and procedural standards for systems that are used to transmit any artificial or prerecorded voice message via telephone. Such standards shall require that—

(A) all artificial or prerecorded telephone messages (i) shall, at the beginning of the message, state clearly the identity of the business initiating the call, and (ii) shall, during or after the message, state clearly the telephone number or address of such business; and

(B) any such system will automatically release the called party's line within 5 seconds of the time the system receives notification that the called party has hung up, to allow the called party's line to be used to make or receive other calls.

(e) STATE LAW NOT PREEMPTED.—Nothing in this section or in the regulations prescribed under this section shall preempt any State law that imposes more restrictive intrastate requirements or regulations on, or which prohibits—

(1) the use of telephone facsimile machines or other electronic devices to send unsolicited advertisements;

(2) the use of automatic telephone dialing systems to transmit prerecorded telephone solicitations; and

(3) the use of artificial voice or prerecorded messages.

(f) PREEMPTION OF INCONSISTENT INTERSTATE COMMUNICATIONS LAWS.—This section preempts any provisions of State law concerning interstate communications that are inconsistent with the interstate communications provisions of this section.

ADDITIONAL VIEWS OF MR. PRESSLER

The objectives of S. 1410, the Telephone Advertising Consumer Rights Act, are to respond to the national outcry over the explosion of unsolicited telephone advertising. Many consumers are simply tired of the nuisance of telephone solicitations. Information age technologies, combined with the telephone, now give modern door-to-door salesmen an unrestricted ability to invade the privacy of our homes. Unlike other mediums of communication media, the telephone commands our instant attention. Junk mail can be thrown away. Television commercials can be turned off. The telephone demands to be answered.

People are increasingly upset over the invasion of their privacy by unrestricted telemarketing. The consumer backlash that has arisen from the cost and the interference of unsolicited telemarketing calls has sparked the introduction of over 1000 bills in State legislatures around the country seeking to limit this abuse. The Federal Government should act now to provide uniform legislation to protect consumers while ensuring that the telemarketing industry continues to be a vigorous player in the U.S. economy.

The primary purpose of this legislation is to develop the necessary ground rules for a cost-effective means of protecting consumers from unwanted telephone solicitations. These rules should enable responsible telemarketers to reach those consumers most responsive to this form of solicitation, while eliminating the cost and time of contacting those individuals who would be least responsive.

To accomplish this balanced approach, the substitute to the Telephone Advertising Consumer Rights Act directs the FCC to prescribe regulations to protect the privacy rights of consumers from the intrusion of unsolicited telephone marketing calls. One such proposal the FCC would consider is the use of a telephone electronic database that would allow consumers to have their phone numbers protected from unsolicited advertising. This type of consumer protection has already been used with great success in the State of Florida. Another proposal the FCC would examine is the placement of all telemarketers on a single exchange, thus allowing consumers to block calls from that exchange.

Some objected to the original legislation because of the extent to which it outlined the safeguards necessary for the creation of a national database. It is important to note that the substitute does not mandate the creation of an electronic database. Rather, it gives the FCC leeway in deciding the best approach to handling this problem. While an electronic database clearly appears to offer the most promising protection for consumers, we recognize that new technologies may arise in the future. For this reason, our legislation directs the FCC to consider a number of alternatives.

The substitute includes a provision that directs the FCC to examine whether local telephone solicitations by small businesses and

second class mail permit holders, which includes newspapers, should be subject to the same FCC regulations that would apply to all other telemarketers. This provision does not give any group a blanket exemption from the FCC regulations.

Under the substitute, the FCC may consider prescribing different methods of procedures to allow newspapers to contact their subscribers. Before this conclusion has been reached, the FCC should establish whether unsolicited calls by such entities are significantly less objectionable to a consumer who has acted affirmately to avoid such calls.

My intention with the substitute is to prohibit "cold calls" by any telemarketer to the telephone of a consumer who has no connection or affiliation with that business and who has affirmatively taken action to prevent such calls. As responsible telemarketers, newspapers and other telemarketers would save both time and money by contacting those people most likely to respond positively to such solicitation.

Another area S. 1410 addresses is computerized calls. Due to advances in auto-dialer technology, machines can be programmed to deliver a prerecorded message to thousands of sequential phone numbers. This results in calls to hospitals, emergency care providers, unlisted numbers, and paging and celluar equipment. There have been many instances of auto-dial machines hitting hospital switchboards and sequentially delivering a recorded message to all telephone lines. In some cases, the calling machine does not release the called party's line until the recorded message has ended. This renders the called party's phone inoperable. In an emergency situation, this can create a real hazard.

To remedy this situation, the substitute requires auto-dialer machines to release the phone line automatically after the called party hangs up. In addition, it requires all prerecorded messages to clearly identify the name, phone number, or address of the person or business initiating the call. This bill also allows hospitals, police stations, fire stations, and owners of paging and cellular equipment to eliminate all unsolicited calls.

The growth of facsimile machines in the workplace has brought another form of unsolicited advertising—the junk fax. Unsolicited facsimile advertising ties up fax machines and uses the called party's fax paper. This costs the recipient both time and money. The sustitute requires that auto-dial fax machines clearly mark on all transmissions the date and time of transmission, the identity of the sender, and the telephone number of the sending machine.

The sustitute will not end all unsolicited calls, but it will allow consumers to choose how their telephones are used and requires vendors to respect that decision. The fair approach taken by this legislation, ensures a robust telemarketing industry while giving consumers relief from unwanted telephone solicitations.

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